Völkerrechtsblog
Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

CURRENT DEVELOPMENTS

The Referendum on Catalan Self-Determination (Part I)

Endemic Rhetoric, Interpretive Hypocrisy and Legal Imagination

ZORAN OKLOPCIC — 22 September, 2017

Print 0

Dawn of the Living Dead? Self-Determination in (Southern) Europe, 1991 – 2017

Scheduled to take place on 1 October 2017, the referendum on the independence of Catalonia looks to be a turning point in the history of the Iberian peninsula; if not a point of no return, then at least the moment after which the relationship between Catalonia and Spain will never again be the same. Though it is hard to predict what will happen on that day—the Spanish Constitutional Tribunal has declared the referendum unconstitutional, and Spain's government has vowed to prevent it—the legal developments that precede it are striking, not only for the kind of constitutional pluralism inadvertently 'inflicted' upon the Spanish polity (quite unlike that hoped for by its proponents in constitutional theory, but also for the dramatic resurgence of the vocabulary of popular self-determination, which, until recently, many considered all but extinct from the public discourse of Western liberal

democracies.

Though easy to miss amidst anxious speculations of what comes next in Catalonia, this resurgence becomes much more apparent once one compares the language used in the Catalan Law on the Self-Determination Referendum with the rhetorical devices used in comparable documents elsewhere in Europe over the last decade and a half. In an unmistakable contrast with the vocabulary used by the Montenegrin (2005), Scottish (2013), or Kosovar parliaments (2008)—none of which ever made a reference to the right to self-determination of the peoples that elected them as the grounds for the independence of their polities—the Catalan parliament not only invoked it explicitly, but did so in a way unheard of in Europe since the summer of 1991.

The kind of vocabulary related to the right to self-determination last seen 'in action' in the Croatian and Slovenian declarations of independence from the federal Yugoslavia in the last days of June of 1991, has recently made a striking appearance in the Catalan Law on the Self-Determination Referendum. In contrast to allusive references to self-determination-sounding aspirations which peppered the founding documents of aspiring, or newly independent states in Europe over the last decade and a half— the 'will of the citizens' (Montenegro), the 'will of the people' (Scotland) or the 'desires of our people' (Kosovo)—the Catalan parliament invoked self-determination not as a 'wishy-washy' moral aspiration, but rather as a hard, non-negotiable, and 'inalienable' legal right, grounding it—just as the Slovenians and the Croatians did in 1991—in a strategically crafted hybrid of international legal, constitutional and moral arguments.

Like the Croatian Diet in the summer of 1991—which took pains to underscore the 'thirteen century-long juridical tradition of the Croatian people', 'ever-conscious of its right to independence … as one of the oldest …historical nations in Europe', preserved, they insisted, even during long periods of 'personal' and … [other] juridical unions with other nations'—the 2017 Catalan parliament made sure to remind the readers of the 'explanatory memorandum' to the Self-Determination Law of the:

> **confluence of the historical legitimacy and legal and institutional tradition of the Catalan people —interrupted, over the course of the centuries only by force of arms—and the right of peoples to self-determination, enshrined in international legislation and jurisprudence and the principles of popular sovereignty and respect for human rights, as the basis for all legal systems.**

Unlike the documents that paved the way for the secession of Slovenia and Croatia from then-Yugoslavia, however, the Law of the Catalan parliament did not have the luxury of invoking the text of the national constitution itself, which in the Yugoslav case explicitly, albeit effusively, grounded the legitimacy of that socialist federation in the right of all Yugoslav nations to self-determination, including secession. In contrast to the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY)—a document inspired by Leninist policy towards the solution of the national question in multinational states— article 2 of the 1978 Constitution of the Kingdom of Spain reveals its indebtedness to a different tradition of political thought: the Jacobin tradition of French republicanism. Instead of the right to self-determination of all of its 'nations', article 2 asserts the indissoluble unity of the Spanish Nation, 'the common and indivisible homeland of all Spaniards', while recognizing and guaranteeing 'the right to self-*government*'—not self-determination—to 'the nationalities and regions of which it is composed and the solidarity among them all'. Like the Croatians (and Slovenians) in 1991—and the secessionist states in antebellum US before them—the 2017 Catalan parliamentarians' invocation of the right of their people to self-determination hinges on two assertions which only a small minority of constitutional and international lawyers—both in 2017 as well as 26 years ago—would be willing to support without important extra-juridical qualifications: (1) that it is the organs of their territorial unit (Slovenia, Croatia, or Catalonia) and not the organs of the central government (Spain, Yugoslavia) which have ultimate interpretive authority when it comes to the meaning of the national constitution; and (2) that this authority is actually supported by positive international law.

Though identical in their bottom line, the right to self-determination invoked by the Catalan parliament was different in one important aspect from those of the former Yugoslav republics in 1991. In contrast to the Constitutional Decision on the Sovereignty and Independence of Croatia—which simply took notice of the fact that Yugoslavia ceased to exist as a 'constitutionally and legally ordered state'—the Catalan parliament made sure to take notice of the fact that the Catalan government made every effort to persuade the Spanish government to respect the right of the Catalan people to the 'democratic management of public affairs'. It is only after 'exhausting all forms of dialogue and negotiation with the Spanish State', did the Catalan parliament decide to exercise the power which inheres in its 'inalienable' right to self-determination, and to call a referendum on the unilateral secession of Catalonia. In contrast with the Croatian and Slovenian invocations of the international legal right to 'external' self-determination —interpreted as belonging to the peoples of the Yugoslav republics *simpliciter*, with no limitations or qualifications—the right to self-determination which appears in the discourse of the Catalan parliament has much stronger overtones of what, since 1991, came to be known as the 'remedial' right to self-determination.

The Secession of Catalonia: A Remedy for What?

How deep are the differences between the Southeastern (1991) and the Southwestern European (2017) visions of the right to self-determination? On the one hand, the Slovenian, Croatian and Catalan visions all share the same bottom line: the vision of self-determination as an inalienable right which belongs to sub-state, territorially pre-defined 'peoples', which may be—in the final analysis—exercised without regard to the provisions of positive constitutional order, or the opinions of the rest of the wider state's citizens. On the other hand, the quarter of a century since the dissolution of Yugoslavia has seen new legal developments that influenced the Catalan understanding of the right to self-determination in international law as something that must be morally justified, not simply asserted. One such development, as I've just mentioned, has been the increasingly influential interpretation of that right as having 'evolved' into a remedy for the failure of a sovereign state to act in conformity with the minimal

standards of political legitimacy.

Had it been only for the increasing prominence of the remedial vision of self-determination among international lawyers, the architects of the Catalan independence project might have never mustered sufficient courage to invoke it as explicitly as they did in the Law on the Self-Determination referendum. Even if one were to accept, following the reasoning of the Catalan Law on the Self-determination Referendum, that 'democratic management of public affairs has been internationally accepted as one of the cornerstones of contemporary society—'inextricably linked to, amongst other rights, that of citizens' direct and indirect political participation and to the right to freedom and to human dignity, including freedom of expression and opinion, freedom of thought and freedom of association'—from this it still doesn't follow that the remedial conception of the right to self-determination supports the proposition that those rights ought to be exercised at the level, manner, and with juridical consequences asserted by the Catalan parliament; or, that it is the Catalan parliament that has the ultimate authority to decide the manner in which those rights ought to be exercised.

Though a different conclusion suggests itself solely from reading the text of the Law, Catalan sovereigntists have been keenly aware of this interpretive hurdle. In fact, when viewed against the backdrop of the discourse that dominated Catalan sovereigntist circles over the last decade, the vocabulary of the legal right to external self-determination appears as a relatively marginal component, certainly dwarfed by the notoriously allusive *dret a decidir* (the right to decide)—its tactical rhetorical substitute, originally conjured up in the early 2000s not by Catalan, but by Basque separatists. In the Catalan context, its rhetorical function was three-fold: (1) to build support for a referendum among those ambivalent about Catalan independence, (2) to convey the illegitimacy of the Spanish government's opposition to a broader, international audience, and, (3) to do so without raising its anxiety-levels in the process (something, which the Catalan strategists rightly presumed as likely to happen in response to explicit references to the right of self-determination).

Looking back, it is difficult to say what made the leaders of the Catalan secessionist movement change their minds, and take their gloves off, and begin to invoke (or as some would argue, return to) the right to external self-determination as their international legal entitlement. While it's possible that what made them raise the rhetorical ante was, indeed, their authentic 'frustration'—the frustration, that is, with the failure of their 'final attempt … to guarantee for the people of Catalonia full recognition, representation and participation in the … life of the Spanish state without any form of discrimination'—it is highly unlikely that this frustration alone, without other extraneous encouragements, would have been powerful enough to push the strategists of Catalan sovereignty to insist on a claim, which not even the most enthusiastic supporters of the remedial right to self-determination among international lawyers are willing to take for granted.

Rather than incidental to the totality of the Catalan grievances, that claim is in fact its centerpiece: the assertion that the decision of the Spanish Constitutional Tribunal to strike down parts of the 2006 Statute of Autonomy of Catalonia amounts to 'the breaking of the Spanish constitutional pact of 1978'. This claim appears to be highly dubious: though highly sophisticated arguments have been made about why the Constitutional Tribunal acted unconstitutionally in this case, the fact remains that the text of the Constitution of Spain contains no references to anything that would identify it as the 'pact'. To the contrary: as the document ratified by the 'Spanish people' is 'based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards'. Though the legitimacy of insisting on the impossibility to transcend this limitations of article 2 other than through constitutional amendment is highly dubious as well (both prudential, ethically, and juridically) the claim on which Catalans pin much of their moral case to secede is still established on a rhetorical trick—which those with a concrete stake in the conflict on the other side will never be slow to detect: the alleged violation of the Spanish Constitution presumes the acceptance of something which is the very object of constitutional dispute, the institutional locus of *Kompetenz-Kompetenz* within the Spanish constitutional order.

For our purposes, this is important for another reason. It directs our

attention towards the jurisprudential development which (beyond an increasingly influential remedial account of self-determination) played a role in emboldening the Catalan secessionists to bet on the success of an argument which failed not only in the United States in 1865 (in the guise of the theory of state rights) but also in Canada in 1995 (in the guise of the compact theory of federation) and which only superficially assisted the Croatians and Slovenians in their struggle to secede from an already crumbling Yugoslavia. Rather than a naively held belief that the audience won't notice that the legitimacy of their righteous protestations hinges on the acceptance of something which is extremely unlikely—i.e. the notion of a 'pact' as the juridical nature of the Spanish constitution—what seems to have informed the Catalan juridical imagination of self-determination were the more recent constitutional developments in other parts of the world, particularly those in Canada and the United Kingdom. What these developments offered, or so it seemed, was a new understanding of the way in which liberal democratic constitutional orders (however established) ought to respond to the desires of determined minorities to be governed differently, lest they want to lose their domestic and international legitimacy. Confronting the promise of those developments, as well as their limitations, is the topic of Part II of this short essay.

Zoran Oklopcic is Associate Professor at the Department of Law and Legal Studies at Carleton University. He earned his SJD from the University of Toronto Faculty of Law and was MacCormick Visiting Fellow at the University of Edinburgh School of Law, Junior Faculty at Harvard Law School's Institute for Global Law and Policy in Doha, Qatar, and a Hauser Global Research Fellow at the NYU School of Law. His book, Beyond the People: Social Imaginary and Constituent Imagination is forthcoming with Oxford University Press in February 2018.

Cite as: Zoran Oklopcic, "The Referendum on Catalan Self-Determination: Endemic Rhetoric, Interpretive Hypocrisy and Legal Imagination", *Völkerrechtsblog*, 22 September 2017, doi: 12345678.

ISSN 2510-2567

Tags: *Self-determination*, *Sovereignty*, *Spain*

Print Facebook 59 Twitter Email

Related

The Global South in Comparative Constitutional Law
14 July, 2017
In "Global South in Comparative Constitutional Law"

Interrogating "Constitutionalism of the South" and New Pathways for Research: The Case for a Central America in the Global Debate
7 August, 2017
In "Global South in Comparative Constitutional Law"

Letting Go of Territorial Integrity: Getting Realism and Ideals Right on Ukraine
16 June, 2014
In "Current Developments"

PREVIOUS POST
Access to Justice for Socio-Economic Rights: Lessons from the Indian Experience

NEXT POST
The Referendum on Catalan Self-Determination (Part II)

No Comment

Leave a reply

Your email address will not be published. Required fields are marked *

Name (required)

E-Mail (required)

Website

Notify me of follow-up comments by email.

Notify me of new posts by email.

Copyright © 2016 · | ISSN 2510-2567 | Impressum & Legal